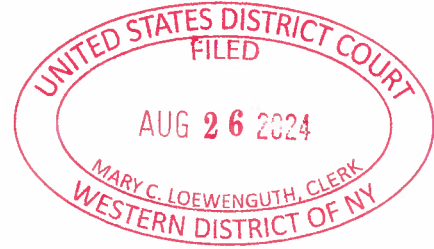


UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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DARRIN SHIVERS,

Plaintiff,

v.

22-CV-720 (JLS) (HKS)

KEVIN MCGEE, D.O.,<sup>1</sup>

Defendant.

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**DECISION AND ORDER**

*Pro se* plaintiff Darrin Shivers commenced this action against Defendant Kevin McGee, D.O.,<sup>2</sup> in September 2022, alleging a constitutional violation based on denial of medical care for his broken ankle. *See* Dkt. 1; Dkt. 24.

Defendant moved to dismiss the complaint, pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6). Dkt. 26. Plaintiff responded (Dkt. 32), and Defendant replied (Dkt. 33). On August 1, 2024, United States Magistrate Judge H. Kenneth Schroeder, Jr., issued a Report and Recommendation (“R&R”),<sup>3</sup>

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<sup>1</sup> Plaintiff named Kenneth McGee as a Defendant in this case. *See* Dkt. 1. Defendant states that Defendant Kenneth McGee was improperly named, and that Defendant McGee’s proper identity is Kevin McGee, D.O. *See* Dkt. 26-1 ¶ 1; *see also* Dkt. 34, at 2 n.2. Plaintiff does not disagree. The Court will direct the Clerk of the Court to update the caption to reflect Defendant McGee’s correct identity.

<sup>2</sup> Plaintiff initially named another Defendant as well, but the Court dismissed that Defendant at the screening stage. *See* Dkt. 25. Defendant McGee is the sole remaining Defendant.

<sup>3</sup> On September 7, 2023, this Court referred the case to Judge Schroeder for all pretrial matters, pursuant to 28 U.S.C. §§ 636(b)(1)(A)–(C). Dkt. 27.

recommending that this Court deny Defendant's motion to dismiss in its entirety. Dkt. 34.

Neither party objected to the R&R, and the time to do so has expired. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). A district court may accept, reject, or modify the findings or recommendations of a magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). A district court must conduct a *de novo* review of those portions of a magistrate judge's recommendation to which a party objects. *See* 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3). But neither 28 U.S.C. § 636 nor Federal Rule of Civil Procedure 72 requires a district court to review the recommendation of a magistrate judge to which no objections are raised. *See Thomas v. Arn*, 474 U.S. 140, 149–50 (1985).

Though not required to do so here, this Court nevertheless reviewed Judge Schroeder's R&R. Based on that review, and absent any objections, the Court accepts the R&R.

Plaintiff filed a motion to appoint counsel. Dkt. 35. After considering the factors set forth in *Hodge v. Police Officers*, 802 F.2d 58, 60–62 (2d Cir. 1986), and in light of the procedural posture of this case—in particular, that the case will proceed to discovery and possible summary judgment and/or trial—the Court grants Plaintiff's motion to appoint counsel and will arrange for appointment of *pro bono* counsel to represent Plaintiff in this case going forward.

### CONCLUSION

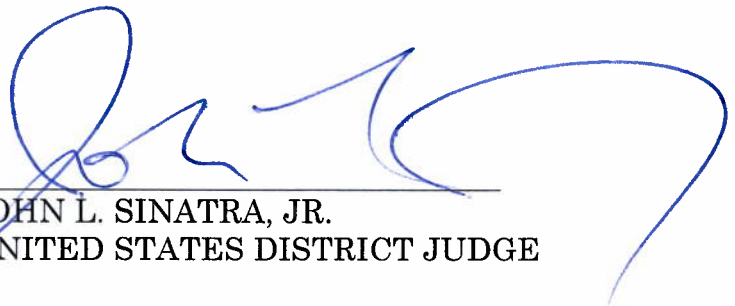
For the reasons stated above and in the R&R, the Court:

- Denies Defendant's motion to dismiss (Dkt. 26);
- Grants Plaintiff's motion to appoint counsel (Dkt. 35);
- Directs the *Pro Bono* Administrator to undertake the process of appointing *pro bono* counsel to represent Plaintiff for further proceedings in this case; and
- Directs the Clerk of the Court to update the caption of the case, as indicated on the caption of this decision and order.

The Court refers this case back to Judge Schroeder for further proceedings, consistent with the referral order at Dkt. 27.

SO ORDERED.

Dated: August 26, 2024  
Buffalo, New York



JOHN L. SINATRA, JR.  
UNITED STATES DISTRICT JUDGE